LIM ENG KAY

v.

JAAFAR MOHAMED SAID

FEDERAL COURT, IPOH
RAJA AZLAN SHAH CJ (MALAYA)
SALLEH ABAS FJ
EUSOFFE ABDOOLCADER J
[CIVIL APPEAL NO. 57 OF 1981]
2 FEBRUARY & 24 MARCH 1982

DAMAGES: *Quantum - Appeal against High Court award on ground that it was excessive - Cross-appeal on ground High Court judgment erroneous in law and fact - Principles governing assessment of damages and award of interest and rate of interest.*

The respondent was a trained school teacher. He passed the Higher School Examinations in 1971 and enrolled as a student of University Science Penang to follow a course in social science. He was given study leave on half-month pay for the first six months and thereafter the leave was without pay, with the usual agreement to serve the government for seven years after the completion of his studies.

He passed his first year examination in 1973, although he was referred in a few subjects which he eventually passed at a subsequent examination.

On 13 October 1973, while respondent was riding his motor cycle, a motor car driven by the appellant collided into him and the respondent sustained serious injuries. He was given leave of absence by the University for two sessions. But when he resumed his studies, he failed badly in his examination and was asked to leave. He left in early 1977 and since then he had been unemployed. He tried giving private tuition but had to give up because he was unable to concentrate.

The respondent sued the appellant for general and special damages. Liability was agreed between the parties at the ratio of 90% against the appellant and 10% against the respondent. The case was contested on determination of quantum for damages only.

At the outset of the hearing in the Court below, the parties informed the Court that special damages were agreed to as at RM2,300 but at the end of the trial, the Judge awarded another item of special damages in addition to the agreed figure, as pre-trial loss of income amounting to RM65,945. General damages awarded were RM80,000 for pain and suffering and loss of amenities and RM231,000 for post-trial loss of earnings, and interest at 6% on the RM80,000 from the date of service of the writ and 3% on the special damages from the date of the accident.

The appellant appealed against the decision on the ground that the total amount of award of RM379,245 was excessive and too generous to be a fair sum to compensate the respondent for the injuries involved. He contended that:

1. The award could not stand because it was not consistent with public policy in that insurance companies who have to bear the burden of high awards may eventually pass this liability to the general public by increasing rates of insurance premium.

2. The damages for pain and suffering and loss of amenities were excessive and should be reduced to RM40,000; that the respondent should have mitigated the damage by accepting the offer for corrective surgery to rectify the deformity to reduce the shortening of the right leg caused by the fracture to it uniting badly and that the respondent's refusal should be taken into account in assessment of damages.

3(a) The Registrar of the University, who gave evidence as to the capability of the respondent's successfully following his course of studies was not competent to give such opinion, which opinion should have come from the Dean.

(b) The assessment of special damages for loss of earnings for the pre-trial period was wrong in law because it had already been agreed to as RM2,300 at the beginning of the trial and also because the pre-trial loss of earnings so assessed was "not pleaded, particularised and proved." No such assessment could be made without an amendment of the respondent's statement of claim.

4. The method of multiplicand times multiplier would be an appropriate method and should be adopted to assess loss of future earnings.

5. The interest on the lump sum for pain and suffering and loss of amenities should be waived altogether because the amount of damages awarded was large.

On the other hand, the respondent submitted in his cross-appeal that:

1. The sum of RM80,000 awarded by the learned Judge for pain and suffering and loss of amenities of life, was loss in view of the fact that no reference was made to, (a) cost of future care (b) loss of expectation of life and (c) diminished prospect of marriage.

2. Interest of the lump sum awarded for pain and suffering and loss of amenities should be awarded in two tiers: i.e. at 6% from the date of service of writ to the date of trial and at 8% form the date of trial to the date of payment.

Held:

[1] The award of RM80,000 for pain and suffering and loss of amenities of life should be upheld.

[2] The award for loss of future earnings should be reduced to RM93,587.42.

[3] The pre-trial loss of income should be reduced to RM56,053.

[4] The agreed special damages to remain at RM2,300.

[5] The interest on [1] to be at 6% with effect from the date of service of writ to the date of payment and interest on [3] and [4] to be at 3% with effect from the date of accident to the date of payment.

[6] The sums in [1], [2] and [3] to be further reduced by 10% in order to take into account the 10% agreed liability for the accident attributable to the respondent.

[The appeal was allowed with costs subject to the award being reduced to the extent in the foregoing paragraphs. The deposit was ordered to the refunded to the appellant. The respondent's cross-appeal was dismissed with costs.]

Cases referred to:

Fletcher v. Autocar & Transporters Ltd. [1968] 1 All ER 726
Kandalla v. British Airways Board [1980] 1 All ER 341
Lim Poh Choo v. Camden and Islington Area Health Authority [1979] 2 All ER 910
Rasidin bin Partorjo v. Frederick Kiai [1976] 2 MLJ 214
Kow Ah Dek & Anor. v. K. Ratnasingam [1981] 2 MLJ 24

Jefford v. Gee [1970] 1 All ER 1202
Riches v. Westminster Bank Ltd. [1943] 2 All ER 725
Cookson v. Knowles [1977] 2 All ER 820
Pickett v. British Rail Engineering Ltd. [1979] 1 All ER 774
Murtadza bin Mohamed Hassan v. Chong Swee Pian [1980] 1 MLJ 216

Legislation referred to:
Administration of Justice Act 1969 [UK], s. 22
Civil Law Act 1956, s. 11
Law Reform (Miscellaneous Provisions) Act 1934 [UK], s. 3(1)
Rules of the High Court 1980, O. 2, O. 42 r. 12

For the appellant - N.G. Sivanandan; Presgrave & Mathews
For the respondent - Sri Ram (Collin Goonting with him); Collin Goonting & Co.

JUDGMENT

Salleh Abas FJ:

The Facts

The facts in this appeal are as follows.

The respondent was a trained school teacher. He became a teacher on 2 January 1969 by joining what was then known as the Unified Teaching Service and was subsequently posted to Secondary School Tengku Idris Shah, Kapar Selangor. In 1971 he sat for the Higher School Examinations and passed. His results were not spectacular but good enough to enable him to further his studies in a local university. In the following academic session, i.e. 1972/1973 session, which began in June 1972, he enrolled as a student of University Science Penang to follow a course in social science, leading to a degree of Bachelor of Social Science. To enable him to pursue his academic studies, the Government gave him study leave from 1 June 1972 to the end of the course. For the first six months, i.e. from 1 June 1972 to 18 December 1972 he was on half-month pay leave and thereafter the leave was without pay. He also signed the usual agreement with the Government binding him to serve the Government for seven years after the completion of his academic studies.

He passed his first year examinations in 1973, although he was referred in a few subjects, but he eventually passed these subjects at a subsequent examination.

On 13 October 1973 whilst riding his motor cycle along Green Lane, Penang a motor car bearing registration No. AD 7353 driven by the appellant collided into him. He sustained serious injuries and was admitted to General Hospital Penang and later to General Hospital Kuala Lumpur. Because of the accident the University gave him leave of absence for two sessions: 1973/1974 and 1974/1975 sessions. He resumed his studies in the 1975/1976 session as a second year student, but failed badly in his examinations. The University allowed him to continue his studies for another session, i.e. the 1976/1977 session, but after performing badly in the first term of that session, he was asked to leave, and so left the University in early 1977, and since then he has been unemployed. His father arranged for him to give private tuition, but after teaching for one week he gave up the job because he was unable to concentrate, and so has since remained unemployed.

He sued the appellant for general and special damages. Liability having been agreed between the parties at the ratio of 90% against the appellant and 10% against the respondent, the case was contested on determination of quantum for damages only. At the outset of the hearing in the Court below the parties informed the Court that special damages were agreed

to as at RM2,300. But at the end of the trial, the learned Judge awarded another item of special damages in addition to the agreed figure of RM2,300 which was for the repairs of the respondent's motor cycle and transport to and from hospital. This item is a pre-trial loss of income amounting to RM65,945. The award is thus as follows:

A. **General Damages**

(i) Pain and suffering and loss of amenities	RM 80,000
(ii) Post-trial loss of earnings	RM231,000

B. **Special Damages**

(i) Agreed damages for repair of motor cycle and transport to and from hospitals	RM 2,300
(ii) Pre-trial loss of earnings	RM 65,945
Total	RM379,245

C. **Interest**

(i) Interest at 6% on RM80,000 awarded for pain and suffering and loss of amenities from the date of service of the writ to the date of payment; and

(ii) interest at 3% on the total of RM2,300 and RM65,945 awarded as special damages from the date of accident to the date of payment.

The damages so awarded would be borne in the proportion of 90% by the appellant and 10% by the respondent.

The appellant appealed against the decision of the learned Judge on the ground that the award was excessive, whilst the respondent cross-appealed against it on the ground that the learned Judge was erroneous in law and fact in failing to take into consideration certain matters of importance pertaining to the case.

Size of Award and Public Policy

The total amount of award for both special and general damages in this case is RM379,245. Counsel for the appellant submitted that this amount is excessive and too over-generous to be a fair sum to compensate the respondent for the injuries he received. Citing a *dictum* of Lord Denning MR in *Fletcher v. Autocar & Transporters Ltd.* [1968] 1 All ER 726 and that of Griffiths J in *Kandalla v. British Airways Board* [1980] 1 All ER 341, he contended that the award cannot stand because it is not consistent with public policy in that insurance companies who have to bear the burden of high awards may eventually pass this liability to the general public by increasing rates of insurance premium. It is now necessary to see what Lord Denning MR and Griffiths J said on the implication of high awards on public policy. In *Fletcher v. Auto & Transporters Ltd.,* the Master of the Rolls declared:

> If awards reach figures which are 'daunting' in their immensity, premiums must be increased all the way round. The impact spreads through the body politic.

This warning was repeated by Griffiths J in *Kandalla v. British Airways Board,* as follows:

> The damages will, of course, almost always be paid by Insurance Companies, but the ability to pay such damages will have to be passed on the general public through increased premiums; so it is the public who will be paying these extra damages which appear to me to breach the underlying basis on which damages are assessed, namely, that they should be fair compensation for the loss sustained. (Page 349).

In *Fletcher's* case, like Lord Denning MR, Lord Diplock LJ was concerned with the methods adopted in assessing damages in that case. He thus spoke of the futility of monetary award, even though high, of restoring an injured party to the position that he would have been in, if he had not sustained the injuries.

To deal with this submission it is sufficient for us to refer to the speech of Lord Scarman in the House of Lords in *Lim Poh Choo v. Camden and Islington Area Health Authority* [1979] 2 All ER 910. In that case the award of damages totalling £254,765 was castigated on the basis, *inter alia*, that its excessiveness was contrary to public policy. This attack was rejected in the House of Lords by Lord Scarman who delivered the main judgment of the House. His speech on this point, which was concurred by other Law Lords, including Lord Diplock, is reproduced as follows:

> There is no room here for considering the consequences of a high award on the wrong doer of those who finance him. And, if there were room for any such consideration, on what principle, or by what criteria, is the Judge to determine the extent to which he is to diminish on this ground the compensation payable?
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> ...
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> ...
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> The attack, therefore on the total of damages awarded as being excessive, merely by reason of its size, fails. If the appellants are to succeed, they must show that one or more of the component items of the award are wrong. (Pages 917-918).

We accept the speech of Lord Scarman to be the law governing the appellant's submission in that public policy consideration is not a relevant matter which a Judge should take into account when making an assessment of damages. Public policy is always double edged. If high awards would lead to increase in rates of insurance premium and so are against public policy, surely high rates of premium may also promote good and careful driving, not to mention the probability of decrease in the number of people owning cars and also the probability of decrease in road accidents. Are these not for the benefit of the public?

Thus the judicial warnings against the size of award quoted above cannot be construed as laying down a new principle for assessing damages, but are merely intended to serve as a caution, lest the Court might be moved by sympathy for an injured person to giving a higher award than would have been otherwise justified by evidence. The proper approach which we will adopt in this case is therefore to avoid conjecturing into the unchartered sphere of public policy and to confine ourselves merely to the examination of the award in order to see whether its assessment is perverse or whether it was arrived at on an incorrect principle. This was also the approach taken by this Court in *Rasidin bin Partorjo v. Frederick Kiai.* [1976] 2 MLJ 214.

Pain and Suffering and Loss of Amenities of life

Counsel for the appellant submitted that the damages for pain and suffering and loss of amenities of life are excessive and should be reduced to RM40,000. On the other hand Counsel for the respondent submitted in his cross appeal that the sum of RM80,000 awarded by the learned Judge under this heading was low in view of the fact that no reference was made to (a) cost of future care (b) loss of expectation of life and (c) diminished prospect of marriage.

To deal with the respondent's submission first, we are of the view that this submission lacks foundation and substance because there is no evidence that the respondent's injuries are such that he requires future care, nor is there any evidence that his life expectancy is in any

way affected. None of the five doctors who treated and examined him made any reference to the respondent's life expectancy. Similarly there is no evidence as to the prospect of the respondent not being able to get married. The failure to consider any or all of these factors is not the learned Judge's fault, but that of the respondent. There is thus no basis for his submission saying that the assessment under this heading is low.

What is left now is to consider the submission of the appellant and for this we have to turn to the evidence.

Immediately after the accident the appellant was admitted to Penang General Hospital where he remained until he was transferred to Kuala Lumpur General Hospital on 28 December 1973. He was discharged from that hospital on 14 January 1974. The period of his hospitalisation was altogether three months. He went again to Kuala Lumpur General Hospital for further check-up on 13 February and 8 May 1974.

On admission to Penang General Hospital he had a fracture of his right thigh bone, a fracture of jaw bone and was in deep coma indicating that he sustained a severe brain injury. He only regained consciousness on the 12th day of his admission. Whilst at Kuala Lumpur General Hospital about two weeks later he was attended to by Dr. A. Mohandass, Consultant Neurosurgeon and Dr. Pretam Singh, Consultant Orthopaedic and Traumatology Specialist. Dr. A. Mohandass wrote two medical reports on the respondent whilst Dr. Pretam Singh wrote one report.

In his first report dated 29 May 1974 Dr. A. Mohandass stated that the respondent was conscious and alert but somewhat confused and that his behaviour was inappropriate. His speech was slurred. He could not remember the accident but he could remember the moment he was admitted to Kuala Lumpur General Hospital. He laughed inappropriately. In his second report dated 14 May 1976 written after the respondent was readmitted to his care in March and April 1976, Dr. A. Mohandass observed that the respondent had a definite drop in performance in his studies and suffered from impaired memory and lack of appreciation of the seriousness of situation. Dr. A. Mohandass concluded by stating that the respondent's ability to pursue university studies would be markably limited. In other words he was unfit to resume his studies. This second report was written at the request of the University for the purpose of enabling it to make an assessment as to the fitness of the respondent to continue his university studies.

Four years later the respondent was examined by Dato' Dr. N. Arumugasamy another Consultant Neurosurgeon, presumably for the purpose of this trial. In his report dated 29 September 1980 Dato' Dr. N. Arumugasamy confirmed that the respondent "sustained a fairly severe head injury as a result of which he was in coma and in a decerebrate condition, besides having a fracture of his thigh bone". Dato' Dr. N. Arumugasamy noted that the respondent had difficulty in the use of his left hand and suffered from mild memory impairment which, in his opinion, is likely to be permanent. He had frequent headaches and giddiness which, in this doctor's view, is compatible with his having, low pressure hydrocephalus due to the brain injury.

The respondent was also seen by Dr. C. Bala Ratnam, a consultant neuro-physician, who examined him on 14 July 1979. In his report dated 26 July 1979, Dr. C. Bala Ratnam agreed with the findings and opinions of the two neuro-surgeons, i.e. Dr. A. Mohandass and Dato' Dr. N. Arumugasamy, but further wrote that the respondent suffered from lack of "confidence of a 12 years old boy. He laughed inappropriately during the history taking and the examination with an inappropriate affect to the examiner." Dr. Bala Ratnam concluded

that the respondent has "severe post traumatic cortical damage" and has become "depersonalised with a change of personality from a confident, social extroverted individual to an asocial introverted person with severe lack of initiative."

The opinion of Dr. C. Bala Ratnam on the lack of initiative and confidence in our view seems to be borne out by the respondent's own life history. When he was first appointed a teacher on 2 January 1969 he had only a third grade Malaysian Certificate of Education plus his training as a teacher at a teachers' training college. That he sat for and passed, the Higher School Certificate examinations in 1971, despite being burdened with responsibilities and duties as a teacher clearly shows that the respondent was once a highly motivated person who, like many other teachers, was keen to improve himself through acquiring tertiary education. His HSC results may not be brilliant, but these are to be expected from a person, who has to study and work at the same time. Although in his first year university examinations he did not pass easily, as he was referred in certain subjects, the fact that he passed the examinations clearly demonstrates that the respondent was once a serious young man interested in acquiring knowledge, and that given a chance he would certainly leave the university with a degree. Now, with the accident he becomes unsure of himself. His confidence is reduced to that of a twelve year old child. His memory is poor and his behaviour is inappropriate, laughing inappropriately and unable to appreciate the proper atmosphere of the occasions or situations in which he is. Such is the result of the accident.

We are now in the realm of conventional award and the principle which the Court has to follow in arriving at a lump sum assessment under this head of damages is by a comparative method. In *Kow Ah Dek & Anor. v. K. Ratnasingam* [1981] 2 MLJ 24 this Court refused to interfere with the assessment made by Ajaib Singh J of RM70,000 for pain and suffering and loss of amenities of life. In that case the injured party also suffered brain damage, which was more or less of the same degree of severity. Whereas in this case not only is the respondent suffering from brain injury, he also sustains a serious injury to his right leg and a fracture of his jaw bone.

The fracture of his jaw bone was noted by Dr. Loh Hah Eng when the respondent was first admitted to Penang General Hospital and was treated at this hospital. In the absence of any evidence to the contrary, we assume that this fracture must have healed. That leaves us with the question of fracture of his right thigh bone.

This fracture was attended to by the medical staff of Penang General Hospital and after his admission to Kuala Lumpur General Hospital a fortnight later the respondent was looked after by Dr. Pretam Singh, Consultant & Orthopaedic and Traumatology Specialist. He found that his injury was serious and that at that time the fracture was badly united resulting in deformity and shortening of his right leg by approximately three inches. Corrective surgery to rectify the deformity and to reduce the shortening was offered, but the respondent and his father did not agree and wanted time to think over the matter and so no surgery was performed. About six years later on 9 March 1979 the respondent was seen again by Dr. Pretam Singh. In his report dated the following date (10 March 1979) Dr. Pretam Singh stated that the disability of the respondent's right leg is permanent and would 'handicap him in prolong standing, walking, running, and give rise to difficulty in squatting and carrying of heavy objects." It thus cannot be gainsaid that this fracture to his thigh bone is anything but serious.

Counsel for the appellant submitted that the respondent should have mitigated the damage by accepting the offer of surgery and that his refusal should be taken into account in the assessment of damages. The learned Judge in awarding general damages for pain and suffering and loss of amenities in the sum of RM80,000 did take into account the fact that the plaintiff could have by accepting medical advice reduced the shortening of his leg by 50% and he went on to add that it was hardly reasonable to object to an operation on the leg on the grounds that there would be more brain damage.

Thus in view of the nature of injuries to his brain and to his right leg, we cannot see how the award of RM80,000 for pain and suffering and loss of amenities of life is excessive as to warrant our interference. These injuries are much more serious than that suffered by the respondent in *Kow Ah Dek & Anor. v. K. Ratnasingam.* In the present case in addition to brain injury the respondent also suffered a serious fracture of his thigh bone. This accident has not only changed the character of the respondent, but also left him with a physical deformity, which handicaps him in performing such simple activities as walking and running. Besides he also suffers from frequent headaches and giddiness. We therefore uphold the award of RM80,000 for pain and suffering and loss of amenities of life.

Loss of Earnings

At the time of the accident the respondent was on nopay study leave, which would have ended by June 1975 had it not been for the supervening accident. He would have returned to the teaching service and would have resumed earning salaries which were suspended during his studies at the university. By that date he would at least have to be paid on the basis of a salary scale applicable to him prior to joining University Penang if he had failed to be graduated. But if he had graduated his salary would have been on the basis of either a general degree pass or an honour's degree pass. The learned Judge accepted the evidence of the Registrar of the University (PW2) as to the capability of the respondent's successfully following his course of studies. The Registrar testified that the Dean's assessment of the respondent was that he had a chance of success in social science and that in his opinion which was based on reports and discussions with the respondent he was an average student and had every possibility of graduating.

Counsel for the appellant submitted that the Registrar was not competent to give such opinion, especially in view of the respondent's poor results in his first year at the university. He submitted that such opinion should come from the Dean. In our judgment whilst such evidence may properly be given by the Dean of the relevant faculty, the Registrar's evidence is not without significance. Although he is not a member of the teaching staff, in his capacity as an administrative officer of the university he must have been acquainted with students' problems and their academic progress and achievement and must have seen so many of them who, with the same degree of ability and performance as that of the respondent, yet passed out of the University successfully. We therefore hold that it was not erroneous for the learned Judge to accept the Registrar's evidence on the pre-accident prospect of the respondent graduating successfully. Such opinion was not a wild conjecture but a genuine assessment based on experience and reports and discussions which he had with the respondent.

Based on this evidence the learned Judge made an assumption, as a basic premise in the assessment of loss of earnings, that the respondent would have been graduated with a general degree and by June 1975, he would have commenced earning his salary scale of teachers with a general degree. In our view this is a fair assumption based on the evidence before him. There was a reasonable certainty that he would have been so graduated and would

have earned that salary, if he had not been involved in the accident. The learned Judge, then next divided the loss of earnings into two periods - i.e. pre-trial period and post-trial period. The pre-trial period is between the date of the accident (13 October 1973) and the date of the trial (31 October 1980), whilst the post-trial period is between the date of the trial to the date when he would be reaching the retiring age of 55 years (31 March 2002).

(A) **Pre-trial Period - Loss of Earnings as Special Damages**

For this period the learned Judge assessed the loss of income to amount to RM65,945. This sum was added to the sum of RM2,300 agreed as special damages, resulting in a total of RM68,245 as special damages with interest at 3% from the date of the accident till the date of payment.

Counsel for the appellant attacked this assessment as being erroneous in law, because the special damages were already agreed to as at RM2,300 at the beginning of the trial and also because the pre-trial loss of earnings so assessed was "not pleaded, particularised and proved," He submitted that no such assessment could be made without an amendment of the respondent's statement of claim. The point taken by the Counsel is purely a technical point on pleading. The statement of claim, as amended on 3 November 1980 pursuant to the respondent's application by summons-in-chambers contains the following paragraphs:

> 5. And the plaintiff claims damages for:
>
> (a) loss of earnings;
>
> (b) prospective loss of earnings;
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> ...
>
> 7. Wherefore the plaintiff claims:
>
> (a) Special Damages amounting to RM3,300;
>
> (b) General Damages;
>
> (c) interest at rate of 6% per annum from date of filing of writ to date of realisation;
>
> (d) Costs;
>
> (e) Any other relief which this Honourable Court deem fit to grant.

From these two paragraphs of the statement of claim it is obvious that the respondent's solicitors treated the claim for loss of earnings as falling into two categories - (a) pre-trial loss, which they described it as 'loss of earnings" and (b) future loss of earnings, which they referred to as " prospective loss of earnings." But instead of pleading the pre-trial loss of earnings or "loss of earnings" as they described it as an item under special damages, they erroneously pleaded it as an item under general damages. This is purely a technical mistake, which in our view did not in any way affect the substance or prejudice the appellant - see O. 2 (Effect of Non-Compliance) of the Rules of the High Court 1980. We cannot see how the respondent should be deprived of his right by a purely technical error on the part of his solicitors, who were not up-to-date with this aspect of legal technicalities. In any case prayer (e) in para. (7), "Any other relief which this Honourable Court deem fit to grant" must not be treated as a mere ornament to pleadings devoid of any meaning. We think that this prayer and the prayer for "loss of earning" in para. 5(a) should entitle the Court to make such an assessment.

It is true that at the time of the accident, the respondent was not earning, and so Counsel for the appellant submitted that there was no loss of earning at all. With respect we disagree with his submission, because at that time the respondent was not a mere student. He was a

teacher on no pay leave in order to enable him to obtain a higher qualification. He had more than a secured job because by an agreement which he signed on 18 December 1972 he was under an obligation to serve the Government for seven years after completing his studies at the university. Thus irrespective of success or failure of his university studies, he definitely had a secured job waiting for him. Now because of the accident he has become unemployed. We have no evidence whether his service as a teacher was terminated by the Government but in view of the undisputed fact that the respondent is unemployed we assume that because of his injuries he could not be taken back into teaching service and so his service was terminated. Therefore it is clear that the accident has not only robbed him of the chance - a very good chance - of graduating which would have led him to earn a bigger salary but also deprived him altogether of the job which he once had. This is a very real and substantial loss and indeed a total loss of earning as far as teaching is concerned because he could not even give private tuitions which his father had arranged for him.

In view of these circumstances we think that the finding that the respondent's pre-trial loss of earning amounted to RM65,945 was correct in principle, but we do not agree that the whole sum should be awarded without taking into consideration his income tax liability. At this level of income there ought to be a deduction of 15% for income tax. This is equivalent to RM9,891.75. Thus the sum which could be awarded as a reasonable estimate for the respondent's loss of income is (RM65,945 - RM9,892) RM56,053. The award of this sum in addition to the agreed sum of RM2,300 as special damages is not wrong in principle because the damages under this heading was in fact pleaded although it was incorrectly pleaded as general damages instead of as special damages.

(B) **Post-Trial Period - Loss of Future Earnings**

The learned Judge assessed the damages under this heading to be RM231,280. The method adopted by him is not on the basis of multiplicand (representing income) times multiplier (representing years of purchase). Instead he calculated the total amount of salaries which the respondent was expected to earn from the date of trial to the date of his retiring age. Having ascertained this amount to be RM501,240, the learned Judge reduced it progressively as follows:

(1) This gross sum of RM501,240 was reduced by a sum of RM38,700 which the respondent was expected to earn at RM150 per month for the remaining period of his working life (21 years and 6 months or 258 months), thus leaving a balance of RM462,540.

(2) That balance of RM462,540 was further reduced by one-third to take into account contingencies of life, thus leaving a balance of RM308,360; and

(3) This further balance of RM308,360 was further reduced by another 25% on account of income tax liability, leaving a net figure of RM231,280, which he held to be the loss of future income.

Admittedly loss of future earnings is inherently speculative and it is even more exaggerated if its assessment is made, as the learned Judge did, on the basis of actual amounts of gross earnings which the respondent would have earned during the whole of the remaining years of his working life. We therefore agree with the submission of Counsel for the appellant that the method of multiplicand times multiplier would be an appropriate method and should be adopted. The basis of allowing these damages is the reasonable certainty that the respondent would have been earning the salaries of a graduate teacher had it not been for the injuries he received and the certainty that he would have gone back to teach at least as a non-graduate teacher if he had failed to obtain an academic qualification.

On the date of the trial if he had not been injured he would have been drawing a salary under a Cabinet Committee Report at RM1,360 per month, i.e. RM16,320 per year. The learned Judge was right in holding that the respondent was capable of doing certain work. This is definitely confirmed by Dr. Bala Ratnam who said in his report that the respondent's "ability to learn a self-supporting trade is guarded". It is of course a matter of conjecture as to what that self-supporting trade is. However, the learned Judge assessed RM150 a month as the probable income which the respondent is expected to earn. In our view this sum is too low under the present condition, because even a peon earns more than RM200 a month. We therefore assess that the income which the respondent is expected to earn would be RM350 a month. This means that the loss of future income is (RM1,360 - RM350) RM1,010 a month.

As to the multiplier, at the time of the trial the respondent was 33 years old and therefore would have another 22 years of working life, taking the retiring age to be at 55. To be fair to both parties we have to take into account not only his liability to pay income tax but also his eligibility to receive gratuity and pension, if his service had continued without cessation. Taking these factors into consideration we are of the view that the appropriate multiplier should be 10. Thus on this multiplier at RM1,010 a month, the capital sum derived therefore is RM93,587.42 which is worked out as follows:

RM1,000 per month for 10 years	=	RM92,660.82
RM 10 per month for 10 years	=	RM 926.60
RM1,010		RM93,587.42

Interest

The learned Judge awarded interest at 6% from the date of service of writ (21 November 1975) to the date of realisation on the lump sum awarded for pain and suffering and loss of amenities, and at 3% from the date of accident (13 October 1973) till the date of payment on the aggregate of the amount agreed as special damages and the sum awarded as pre-trial loss of income. The respondent appealed on interest awarded on the sum awarded for pain and suffering and loss of amenities. His Counsel submitted that interest on this sum should be awarded in two tiers: i.e. at 6% from the date of service of writ to the date of trial (4 November 1980) and at 8% from this latter date to date of payment. Counsel for the appellant on the other hand submitted that interest on this sum should be waived altogether because the amount of damages awarded was large.

The ordering of interest to be included in a sum awarded for damages is a judicial discretion. Section 11 of the Civil Law Act 1956 (Malaysia Act 67) gives a fairly wide discretion to the Court to order interest on a sum adjudged by the Court in cases where a claimant succeeds in proceedings for the recovery of debts or damages. The English equivalent to our s. 11 of the Civil Law Act 1956 was s. 3(1) of the Law Reform (Miscellaneous Provisions) Act 1934. But this section was repealed and replaced by s. 22 of the Administration of Justice Act 1969 which came into effect on 1 January 1970. The change in the law simply means that the Court in England is now obliged, instead of being at its discretion, to award interest; but the principles as to how and in what manner interest is awarded remain the same (**per** Lord Denning MR in *Jefford v. Gee* [1970] 1 All ER 1202). Thus although in England interest is compulsory but because the principles by which the Court awards interest are not changed the result is very much the same as before and therefore similar to the position obtaining in our law. Prior to the passing of the Law Reform (Miscellaneous Provisions) Act 1934, under common law the Court had always had discretion to award interest as a compensation for a

party who has been deprived of the use of its money to which it is legally entitled. The enactment of the judicial discretion by the statute simply gives statutory effect thereto, one of which is that it is not necessary for a plaintiff to claim interest in his pleadings as the Court can award interest without any claim being made in the pleadings. (*Riches v. Westminster Bank Ltd.* [1943] 2 All ER 725).

In submitting that interest should not be ordered, Counsel for the appellant relied upon a *dictum* of Lord Denning MR in *Cookson v. Knowles* [1977] 2 All ER 820 in which his Lordship regarded the inclusion of interest in a lump sum awarded in personal injury cases for pain and suffering and loss of amenities as a double gain for an injured plaintiff. The first gain is inflation which is responsible for the high award. An injured plaintiff has the benefit of high award because due to inflation the assessment of the lump sum is inevitably high since it is assessed at the date of the trial and not at the date of the injury. Thus if interest is ordered on that lump sum, which is already high, especially when the trial does not take place until long after the injury was caused, an injured plaintiff gets a second gain. The gain is greater where due to delay the trial is held long after the date of the injury. Lord Denning therefore recommended that the guideline he made in *Jefford v. Gee* should be altered so that no interest should be awarded on the lump sum awarded at the trial for pain and suffering and loss of amenities.

But this *dictum* was rejected by the House of Lords in *Pickett v. British Rail Engineering Ltd.* [1979] 1 All ER 774. In that case Lord Scarman exposed the fallacy of associating interest with the effect of inflation upon monetary awards. Whilst it is undeniable that an award in its monetary term is higher than it would have been if it had been assessed at the date of injury or at the date of service of writ, its real value, however, remains the same, if not lower, because Courts do take time to adjust to inflationary condition. In any case interest is not to be confused with inflation. Interest is not awarded as a compensation on account of inflation, but awarded because an injured plaintiff has been deprived of the use of money to which he is entitled. This view was already accepted by this Court in *Murtadza bin Mohamed Hassan v. Chong Swee Pian* [1980] 1 MLJ 216. We wish, however, to add here that far from profiting an injured plaintiff, the delay in bringing the case of trial has the effect of increasing his hardship because the longer the delay in bringing the case to trial is, the greater and the longer would be his deprivation. Further we seem to think only of the effect of inflation on monetary awards. Perhaps this is inevitable because inflation becomes part of our every day life. But we must not forget the possibility of deflation which, if it were to occur, would have certainly served to decrease the awards. Thus delay leads to bad results for both plaintiff and defendant.

In view of what we stated above, we cannot accept the submission of Counsel for the appellant that interest awarded by the learned Judge on the sum assessed for pain and suffering and loss of amenities of life should be waived. There is no ground for us to depart from the practice adopted by the Courts in this country, and the size of the award in this case is certainly not a sufficient ground for us to do so

Counsel for the respondent in submitting that interest on this lump sum should be at 8% with effect from the date of trial to the date of realisation relied upon O. 42 r. 12 of the Rules of the High Court 1980. This Order says:

> 12. Every judgment debt shall carry interest at the rate of 8 per centum per annum or at such other rate not exceeding the rate aforesaid as the Court directs, such interest to be calculated from the date of judgment until the judgment is satisfied.

Although the Order is expressed in imperative "shall", it is certainly not intended to be so; because to give effect would be incompatible with the discretionary power of the Court to order interest under s. 11 of the Civil Law Act 1956. We do not think that O. 42 r. 12 can override the provision of the Act. This Order can only mean that the Court may order interest at 8% if the Court thinks that circumstances justify such rate. In no sense must this order be understood as obliging the Court to award interest at 8% and 8% only. We cannot therefore accept the submission of Counsel for the respondent and as such the award of interest by the learned Judge is upheld.

Conclusion

We uphold the award of RM80,000 for pain and suffering and loss of amenities of life but we reduce the award for pre-trial loss of income from RM65,945 to RM56,053 and we also reduce the award for loss of future earnings from RM231,280 to RM93,587.42, thereby reducing the total award from RM379,245 to RM231,940.42. Thus the award should be as follows:

(a) Pain and suffering and loss of amenities of life	RM 80,000.00
(b) Loss of future earning (post-trial loss)	RM 93,587.42
(c) Pre-trial loss of income as special damages	RM 56,053.00
(d) Agreed special damages	RM 2,300.00
Total	RM231,940.42

Interest on (a) is at 6% with effect from the date of service of writ to the date of payment and interest on (c) and (d) is at 3% with effect from the date of accident to the date of payment. The sums in (a), (b) and (c) are further reduced by 10% in order to take into account the 10% agreed liability for the accident attributable to the respondent.

This is a far cry from the amount of award made by the learned Judge, though admittedly it is still large. There is no way in which we can cut it down further. The amount is still unavoidably large because since the date of accident to the date of trial, the salary scales in the public services, including those of teachers have been revised twice. To gauge the extent of the upward revisions, we may just quote that the salary of RM850 per month in 1978 was converted to RM1,105 per month in that same year and with an increment of RM60 per month the salary is apt to be bigger. It is also unfortunate that this case was tried some five years after the accident, and as the award was assessed on the date of the trial this delay further contributes towards enlarging its monetary sum, especially that part which consists of pre-trial loss of earnings, although its real value, as Lord Scarman said in *Pickett's* case, remains the same.

The appeal is therefore allowed with costs subject to the award being reduced to the extent indicated in the foregoing paragraphs. We also order that the deposit be refunded to the appellant. The respondent's cross-appeal is dismissed with costs.

Also found at [1982] CLJ 298